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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY ("PEER"), MARK HAGAN, in his individual capacity and as a member of PEER, and WANDA DEAL, in her individual capacity and as a member of PEER, Plaintiffs, v. UNITED STATES AIR FORCE, and F. WHITTEN PETERS, in his official capacity as SECRETARY OF THE UNITED STATES AIR FORCE, Defendants.	CASE NO. CV 00-06133 MMM (RZx) SUPPLEMENTAL ORDER DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CONTRACTING-OUT CLAIMS

On December 21, 2000, the court entered an order granting in part and denying in part defendants' motion to dismiss.[1] The court concluded that it did not have jurisdiction to hear plaintiffs' claim that the Integrated Natural Resources Management Plan ("INRMP") prepared for

[1]The facts are detailed in the court's December 21, 2000 order ("the December 21 Order").

(23)

Edwards Air Force Base ("Edwards AFB") was inadequate, because it did not appear that a final INRMP had been prepared, and there was thus no final agency action that could be challenged under the Administrative Procedures Act ("APA"). The court also held that it lacked jurisdiction to enter an order prohibiting the termination or transfer of the individual plaintiffs, and that plaintiffs could not seek relief for violation of the Clean Water and Endangered Species Acts because they had not met the notice requirements imposed by those statutes.

As respects plaintiffs' claim that defendants had violated the Sikes Act by contracting out natural resource management tasks and failing to ensure the continued employment of sufficient numbers of natural resource management personnel, the court found that the statute provided two "meaningful standards" against which to evaluate defendants' exercise of discretion — a directive that priority in contracting be given to federal and state governmental agencies, and a requirement that military departments ensure, "to the extent practicable using available resources," that they have sufficient numbers of professionally trained natural resources management and law enforcement personnel available to prepare and implement their INRMPs. The court deferred decision of defendants' motion to dismiss the contracting-out claims, however, as the parties noted in their briefs, but failed to attach, certain Department of Defense and Air Force Instructions that it appeared might provide additional standards against which to judge defendants' actions. The court directed that the parties lodge copies of the instructions, as well as any other statute, regulation or internal guideline that purportedly provided a basis for judicial review under the APA.

Having reviewed the parties' supplemental filings, the court denies defendants' motion to dismiss the contracting-out claims. In addition to the language of the Sikes Act discussed in the court's December 21 order, 32 C.F.R. § 190 sets forth a sufficiently definite standard against which to judge defendants' alleged decisions to contract out the management, implementation, planning and enforcement of their natural resource programs. The court finds, by contrast, that Department of Defense Instruction 4715.3, Air Force Instruction 32-7064, Army Regulation 200-3, and two internal Air Force/Army memoranda are either interpretive pronouncements or internal guidelines that do not have the force and effect of law, and that cannot provide a basis for review

under the APA as a result.

II. DISCUSSION

A. Judicial Review Of Agency Pronouncements

In reviewing agency action under the APA, a court may consider only those agency pronouncements that have "the force and effect of law." *Western Radio Services Co., Inc. v. Espy*, 79 F.3d 896, 900 (9th Cir. 1996) (". . . we will review an agency's alleged noncompliance with an agency pronouncement only if that pronouncement actually has the force and effect of law. . . . We will not review allegations of noncompliance with an agency statement that is not binding on the agency," citing *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982)); *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982) ("'not all agency policy pronouncements which find their way to the public can be considered regulations enforceable in federal court,'" quoting *Chasse v. Chasen*, 595 F.2d 59, 62 (1st Cir. 1979)).

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). Substantively, it must affect individual rights and obligations. Procedurally, it must be issued pursuant to a statutory grant of authority and comply with any procedural requirements imposed by Congress. *Id.* at 302-03. See also *Hodge v. Dalton*, 107 F.3d 705, 708 (9th Cir. 1997) ("This regulation affects 'individual rights and obligations,' and thus constitutes a substantive rule. Moreover, because this substantive rule was promulgated under a specific grant of congressional authority, it has the 'force and effect of law'"); *Western Radio Services Co.*, *supra*, 79 F.3d at 901 ("To determine whether the Manual and the Handbook have the independent force and effect of law: 'the agency pronouncement must (1) prescribe substantive rules - not interpretive rules, general statements of policy or rules of agency organization, procedure or practice - and, (2) conform to certain procedural requirements,'" citing *Fifty-Three Parrots*, *supra*, 685 F.2d at 1136); *Rank*, *supra*, 677 F.2d at 698 ("In order for the [agency document] to have the 'force and effect of law,' [it] must (1) prescribe substantive rules - not interpretive rules, general statements of policy or rules of agency

organization, procedure or practice – and, (2) conform to certain procedural requirements").

A rule is substantive if it "'effect[s] a change in existing law or policy,' or '"affect[s] individual rights and obligations."' If the rule is only indicative of the agency's interpretation of existing law or policy, it is interpretive." *W.C. v. Bowen,* 807 F.2d 1502, 1504 (9th Cir. 1987) (citations omitted) (differentiating between interpretive and substantive rules for purposes of determining whether they may be adopted without notice and comment under the APA). See also *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000) ("For a rule to be labeled as substantive rather than interpretive, it "must be legislative in nature, affecting individual rights and obligations"); *Fifty-Three Parrots*, *supra*, 685 F.2d at 1136 (to satisfy the first prong, the rule must "affect[ ] individual rights and obligations"). The "'starting point for determining if an [administrative manual] is substantive is its text.'" *Moore v. Apfel*, 216 F.3d 864, 868 (9th Cir. 2000) (quoting *Alameda Gateway*, *supra*, 213 F.3d at 1168).

In assessing whether a rule complies with the second prong of the *Chrysler* test, the court must consider whether it was promulgated in accordance with the procedural requirements of the APA and pursuant to an independent grant of Congressional authority. See *Western Radio Services Co.*, *supra*, 79 F.3d at 901. See also *Alameda Gateway*, *supra*, 213 F.3d at 1168 ("the Engineering Regulation was not published in either the Code of Federal Regulations or the Federal Register, providing further evidence that the regulation was not intended to be binding"); *United States v. One 1985 Mercedes*, 917 F.2d 415, 423 (9th Cir. 1990) ("As we explained in *Rank*, the second requirement means that the agency policy must have been promulgated 'pursuant to a specific statutory grant of authority,' so that a policy that was 'neither published in the Federal Register nor disseminated to the public for scrutiny and comment' will not have the force and effect of law"); *Fifty-Three Parrots*, *supra*, 685 F.2d at 1136 (the second prong is satisfied when the pronouncement is "promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress").

B. 32 C.F.R. Part 190

32 C.F.R Part 190, captioned "Natural Resources Management Program," states in pertinent part:

> "The management and conservation of natural resources under DoD stewardship is an inherently governmental function. Therefore, 32 CFR Part 169 does not apply to the management, implementation, planning, or enforcement of DoD natural resources programs. However, support to the natural resources program when it is severable from management of natural resources may be subject to 32 CFR Part 169." 32 C.F.R. § 190.4(h).

32 C.F.R. § 169, captioned "Commercial Activities Program," addresses the contracting out of government activities pursuant to OMB Circular A-76. See 32 C.F.R. § 169.1(b). It specifically states that "functions that are inherently governmental in nature . . . shall be performed by DoD personnel." 32 C.F.R. § 169.4(c).

Defendants concede that the Department of Defense employed notice and comment procedures in promulgating Part 190.[2] They contend, however, that the regulation is interpretive, rather than substantive, and thus that under *Chrysler*, it does not provide the "law to apply" for purposes of APA review.[3] The notice-and-comment requirements of the APA apply only to legislative or substantive rules; they do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b). See also *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993); *Air Transport Ass'n. of America, Inc. v. Federal Aviation Administration*, 291 F.3d 49, 55 (D.C. Cir. 2002) ("The APA requires federal agencies to publish '[g]eneral notice of proposed rulemaking' in the Federal Register, 5 U.S.C. § 553(b), and 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,' 5 U.S.C. 553(c). Section 553, however, exempts 'interpretative rules' and 'general statements of policy' from notice and comment procedures. 5 U.S.C. § 553(b)(3)(A)").

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[2]Military departments are exempt from the notice and comment requirements of the APA. See 5 U.S.C. § 553(a)(1).

[3]See Memorandum of Points and Authorities in Supplemental Brief in Support of Defendants' Motion to Dismiss ("Defs.' Supp. Briefing") at 9:5-11.

The fact that the Department chose to employ such procedures in promulgating Part 190, therefore, suggests that it intended the regulation to have legal effect. See *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir.1993) (". . . an agency seems likely to have intended a rule to be legislative if it has the rule published in the Code of Federal Regulations; 44 U.S.C. § 1510 limits publication in that code to rules 'having general applicability and legal effect'"). See also *Sweet v. Sheahan*, 235 F.3d 80, 92-93 (2d Cir. 2000) ("In addition, although the statute did not explicitly require the agencies to follow the notice-and-comment process, the agencies provided notice to the public and an opportunity to comment, following the requirements of the APA, 5 U.S.C. § 553(b) - lending force to the conclusion that the regulations were an exercise in legislative rulemaking").

Even were this not true, the court would conclude that the regulation is substantive. Substantive rules create new law, rights, or duties, while interpretative rules merely clarify an existing statute or regulation. *Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001). The D.C. Circuit has identified four factors that courts should consider in determining whether regulations are substantive or interpretative: (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, the rule is substantive rather than interpretive. *American Mining Cong.*, *supra*, 995 F.2d at 1112.[4] This test has been adopted by other courts. See, e.g., *Sweet*, *supra*, 235 F.3d at 91.

In the present case, it appears that 32 C.F.R. Part 190 was promulgated pursuant to the

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[4]As noted by the court in *Sweet*, the D.C. Circuit appears subsequently to have modified the second of the factors - whether the regulation is published in the Code of Federal Regulations. In *Health Insurance Association of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994), after noting the statement in *American Mining Congress*, the court observed that in no case had it taken publication in the Code of Federal Regulations as "anything more than a snippet of evidence of agency intent" in deciding whether a rule was legislative and had legal effect.

general delegation of authority set forth in 16 U.S.C. § 670a, which directs that the Secretary of Defense "shall carry out a program" to provide for the conservation and rehabilitation of natural resources on military installations. 16 U.S.C. § 670a(a)(1)(A). The statute further provides that the Secretary of each military department "shall prepare and implement an integrated natural resources management plan" for each military installation in the United States. 16 U.S.C. § 670a(a)(1)(B). The regulation gives content to these general directives by outlining the program prescribed by statute, and by setting forth the criteria that integrated natural resources management plans must meet. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (noting that deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to an agency's construction of a statute it administers is premised on the theory that the statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps). Thus, in addition to invoking its formal rule-making procedures, the Department appears also to have been acting under an implicit delegation of authority from Congress, and to have been delineating an adequate legislative basis to ensure the performance of its mandated duties. For these reasons, the court concludes 32 C.F.R. Part 190 is substantive.

Defendants next maintain that, even if Part 190 is a substantive rule, it sets forth only "loose standards," and provides "no guidance for determining which individual functions constitute 'management of natural resources.'"[5] As noted above, § 190.4 states that "the management, implementation, planning, or enforcement of DoD natural resources programs" is an inherently governmental function that cannot be contracted out. It further provides that "support" functions that are "severable from management of natural resources" may properly be delegated to outside contractors. While the regulation does not define management, implementation, planning, enforcement, or support, this does not compel a finding that it is too indefinite to provide a meaningful standard for judicial review. As discussed in the December 21 Order, "[t]here is a strong presumption that Congress intends judicial review of administrative

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[5]See Defs.' Supp. Briefing at 10:1-3, 10:11-13.

action." *Socop-Gonzalez*, *supra*, 208 F.3d at 843 (internal quotations omitted). Just as they do when interpreting and applying a statute, courts accord words used in agency regulations their common and ordinary meaning. See *Maryland General Hospital v. Thompson*, 308 F.3d 340, 346 (4th Cir. 2002) (interpreting the word "provider" as used in a Health & Human Services regulation according to its "ordinary meaning");*United States v. Southland Management Corp.*, 288 F.3d 665, 689 (5th Cir. 2002) (stating that the phrase "decent, safe, and sanitary," as used in Department of Housing and Urban Development regulations, has a "widely accepted ordinary meaning in the context of housing quality assessments that enables a jury to evaluate whether a property meets this standard, even if the applicable regulations provide no further elaboration on the meaning of the term"); *Xerxe Group v. United States*, 278 F.3d 12357 (Fed. Cir. 2002) ("'To interpret a regulation we must look at its plain language and consider the terms in accordance with their common meaning,'" quoting *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997)).

Section 190.4's reference to "management, implementation, planning, or enforcement of DoD natural resources programs" is capable of definition and interpretation in the context of this case. Similarly, the regulation's reference to "support" services that are "severable from management" has content and can be applied to the facts of this case.[6] Accordingly, the court

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[6]Defendants argue that § 190.4 provides no standard against which to review a particular military installation's decision regarding the appropriate number of natural resources personnel to employ. Section 190.5 states that defense agency directors with land management responsibilities "shall maintain an organizational capacity . . . necessary to establish and maintain integrated natural resources management programs," and "maintain at all levels of command the interdisciplinary natural resources expertise necessary to implement this program. . . ." 32 C.F.R. § 190.5(c)(1), (2). Defendants are correct that this provision provides no standard against which to evaluate staffing levels or defendants' exercise of discretion in that regard. As noted in the court's original order on the motion to dismiss, however, the statute itself provides something of a standard in this regard, i.e., that military departments shall, "to the extent practicable using available resources, . . . ensure that sufficient numbers of professionally trained natural resources management personnel . . . are available" to assist in implementation and enforcement of an INRMP. See 16 U.S.C. § 670e-2. Read together with 32 C.F.R. § 190.4(h), which directs that "management" functions not be contracted out, this provision mandates that defendants employ sufficient numbers of natural resources management personnel to implement

concludes that Part 190 provides a " meaningful standard against which to evaluate the agency's exercise of discretion." *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000).

C. DODI 4715.3, AFI 32-7064, And AR 200-3

DODI 4715.3 was designed to "implement[ ] policy, assign[ ] responsibilities, and prescribe[ ] procedures . . . for the integrated management of natural . . . resources on property under DoD control." DODI 4715.3, ¶ 1.1. The instruction states that the management and conservation of natural resources, including planning, implementation, and enforcement, are inherently governmental functions that should not be contracted out. *Id.*, ¶ 4.1.13. It requires that natural resources personnel have the requisite training and education, and that there be adequate staffing to provide for appropriate resource management and protection. *Id.*, ¶ 4.1.10.

The first page of AFI 32-7064 contains the legend: "Compliance with this publication is mandatory." Nonetheless, it is a self-described "guidance" that "explains how to manage natural resources on Air Force (AF) property in compliance with federal, state and local standards." AFI 32-7064 at 1. The instruction states, in pertinent part, that military installations with "suitable habitat[s] for conserving and managing fish and wildlife . . . must use professionally trained fish and wildlife management personnel to develop, implement, and enforce their fish and wildlife management programs" so as to comply with the Sikes Act. AFI 32-7064, ¶¶ 6.1.1, 6.1.2. It also directs that service contracts for forest management support be used only when in-house, federal or state government assistance is not available. *Id.*, ¶ 8.4.2.

Like DODI 4715.3, AR 200-3 was designed to set forth "policy, procedures, and responsibilities" regarding natural resources on Army lands. AR 200-3, ¶ 1-1. It requires that commanders of major commands staff their facilities "with appropriate natural resources

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and enforce their INRMP unless precluded from doing so by available resources. Moreover, § 190.4 provides meaningful standards for review in areas other than levels of personnel. Its distinction between management and support functions allows the court to evaluate whether defendants have properly or improperly contracted certain natural resources functions to private entities or other governmental agencies. Additionally, § 670a(d)(2) provides a standard against which to assess whether defendants have properly given priority in their contracting to federal and state agencies.

management personnel" who are to perform a number of identified functions. *Id.*, ¶ 1-4c(4). The instruction acknowledges that the management and conservation of natural resources is an inherently governmental function, and thus that the Army's commercial activities program does not apply to the planning, implementation, enforcement or management of its natural resources management programs. *Id.*, ¶ 27(a). The instruction further states that support functions that are severable from management, planning, implementation, or enforcement may be contracted out. *Id.*

Unlike Part 190, these instructions do not have the force and effect of law, and thus cannot provide the "law to apply" for purposes of conducting an APA review in this case. In the first place, all three documents are internal statements of policy or agency practice; they do not create rights or obligations. AFI 32-7064 is described as a "guidance" (AFI 32-7064 at 1), while DODI 4715.3 and AR 200-3 state that they are designed to implement policy and prescribe procedures. Documents that provide guidance and implement policy and procedures are generally interpretive rather than substantive in nature. See *Moore, supra*, 216 F.3d at 868-69 (holding that an administrative manual, which stated that it provided "guiding principles, procedural guidance and information" to agency staff, was an internal memorandum that did not create substantive rules); *Alameda Gateway*, *supra*, 213 F.3d at 1168 (noting that the Army Corps' Engineering Regulation stated that it "provided guidance on procedures and responsibilities" and that its text demonstrated that it was merely a general statement of policy); *James v. United States Parole Comm'n*, 159 F.3d 1200, 1206 (9th Cir. 1998) (provision "intended to guide the Commission in its calculation of release dates consistent with the Sentencing Guidelines" was interpretive and was therefore not binding on the agency); *Rank*, *supra*, 677 F.2d at 698 ("[W]e conclude that neither the VA Handbook nor VA Circular 26-75-8 purports to prescribe 'legislative-type' rules enforceable in federal court against the VA. Rather, we view the portions of the Handbook and circulars cited by the plaintiffs as general statements of agency policy and procedure"); *Lumber, Prod. & Indus. Workers Log Scalers Local 2058 v. United States*, 580 F. Supp. 279, 283 (D. Or. 1984) (Forest Service Manual was not binding on the agency because, *inter alia*, it was "one of a series of general guidelines pertaining to contracting between national forest timber purchasers and scaling

bureaus and independent scaling organizations").

Additionally, none of the documents appears to have been promulgated in accordance with APA procedures or pursuant to a grant of Congressional authority. *James*, *supra*, 159 F.3d at 1206 ("It is well settled that internal policy manuals of federal agencies do not generally create due process rights in others"); *Chen v. Immigration and Naturalization Service*, 95 F.3d 801, 805 (9th Cir. 1996) ("[T]he Executive Order lacked the force and effect of law because it was never grounded in a statutory mandate or congressional delegation of authority"); *Western Radio Services Co.*, *supra*, 79 F.3d at 901 ("The Manual and Handbook are not promulgated in accordance with the procedural requirements of the Administrative Procedure Act. Neither is published in the Federal Register or the Code of Federal Regulations. . . . Nor are the Manual and Handbook promulgated pursuant to an independent congressional authority. The National Forest Management Act authorizes the Secretary to promulgate regulations, but the Manual and the Handbook are not regulations from the Secretary. . . . The Manual and Handbook provisions are contemplated in a Service regulation, not in a congressional statute. We hold that the Manual and Handbook do not have the independent force and effect of law").

That AR 200-3 is called a "regulation" does not alter this result. See *Alameda Gateway, supra*, 213 F.3d at 168 ("Engineering Regulation" was a "policy statement to guide the practice of district engineers" and did not meet the *Fifty-Three Parrots* test). Because the instructions and the regulation are more akin to internal policy manuals that merely interpret the law rather than substantive regulations, and because they were not promulgated in accordance with the APA or pursuant to a grant of statutory authority, they cannot provide the "law to apply" in connection with plaintiffs' challenge to defendants' contracting policies and practices.

D. Internal Policy Memoranda From The Department Of The Army And The Department Of The Air Force

Plaintiffs also contend that internal policy memoranda prepared by the Department of the Air Force and Department of the Army have the force and effect of law, and thus provide a standard against which to evaluate defendants' contracting decisions. These internal documents cannot bind the agencies. See *Multnomah Legal Servs. Workers v. Legal Servs. Corp.*, 936 F.2d

1547, 1554 (9th Cir. 1991) ("Since the internal documents were not for 'public use,' LSC argues, they are 'not entitled to the force and effect of law against the agency.' We agree"); *United States v. Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1980) ("Although we recognize the propriety of the guidelines in the United States Attorney's Manual . . . , these guidelines, as the district court and both parties recognize, do not have the force of law. A court is not required to enforce an agency regulation unless compliance with the regulation is mandated by the Constitution or federal law"); *Oregon Natural Resources Council v. Devlin*, 776 F. Supp. 1440, 1447 (D. Or. 1991) (agency manuals and internal guidelines usually do not provide the requisite law to apply). See also *One 1985 Mercedes*, *supra*, 917 F.2d at 423 ("An agency policy that can only be unearthed by discovery of the agency's internal workings cannot be a policy that was disseminated to the public").

III. CONCLUSION

32 C.F.R. Part 190 has the force and effect of law, and provides a meaningful standard against which to evaluate defendants' contracting out of natural resources responsibilities at Edwards Air Force Base. This regulation, and 16 U.S.C. §§ 670a(d)(2) and 670e-2 provide standards against which the court can review defendants' contracting decisions. Thus, defendants' motion to dismiss plaintiffs' claims regarding the outsourcing of natural resources implementation and enforcement services is denied.

DATED: March 31, 2003

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE